

***United States Court of Appeals
for the Second Circuit***



APPENDIX

77-1366

To be argued by
JONATHAN J. SILBERMANN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

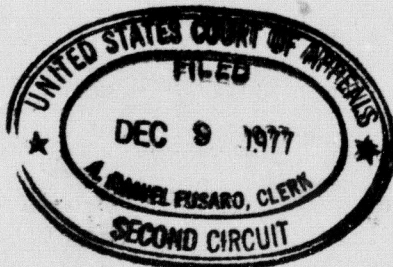
GJERDJ KALAJ and
LAWRENCE MORICI,

Defendants-Appellants.

B p/s
Docket No. 77-1366

APPENDIX TO THE BRIEF
FOR APPELLANT LAWRENCE MORICI

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



MARTIN ERDMANN, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
LAWRENCE MORICI
FEDERAL DEFENDER SERVICES UNIT
509 United States Courthouse
Foley Square
New York, New York 10007
(212) 732-2971

JONATHAN J. SILBERMANN,
Of Counsel.

PAGINATION AS IN ORIGINAL COPY

U.S. DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK
JUDGE: MORICI, LAURENCE
Case Filed: 02/18/77
No. of Defs: 03
U.S. MAG. CASE NO. 76-1471
BAIL - RELEASE
AMT: \$20,000
Date: 12/22/76
Status: Convicted
Disposition: On Government's Motion

U.S. TITLE/SECTION: 18:371
OFFENSES CHARGED: Consp. to unlawfully transfer firearms
ORIGINAL COUNTS: 1
7/58
II. KEY DATES & INTERVALS
ARREST or U.S. Custody Began: 12/21/76
INDICTMENT: 2-18-77
ARRAIGNMENT: 2-24-77
TRIAL: 12/22/76
SENTENCE: 12/22/76

MAGISTRATE: NG-08AJ
DATE: 12/22/76
INITIAL NO.: NG-08AJ
OUTCOME: HELD FOR GJ OR OTHER PROCEEDING IN THIS DISTRICT

26 USC §§5861(d)-and 18 USC §2 - POSSESSION OF FIREARMS

Rhea Kemble Neugarten
791-1920

ATTORNEYS: Rhea Kemble Neugarten

PROCEEDINGS
12/22/76: Complaint filed, Legal Aid for bail only. Defendant released on bail, address: 1648 - 78th St., Bklyn, N.Y., co-signer: Frank Morici, same address.
2/18/77: Indictment filed, 77 Cr. 136 Tenney, J.
2-24-77: No appearance by deft. B/W Ordered. Court directs a not guilty plea be entered. Case assigned to Werker, J. for all purposes Frankel, J.
2-24-77: B/W Issued
3-2-77: All deft's present B/W vacated. Kalaj & Morici sent to Magistrate to appoint counsel. All deft's & counsel to appear on 3-9-77 at 4:30 P.M. Werker, J.
3-8-77: Filed CJA form #23 financial affid - Order appointing counsel Federal Defender Services Unit

3-9-77 Pre-trial conference held, Counsel present. Trial date set June 6, 1977... Werker, J.

6-15-77 Filed Govt's requests to charge

6-15-77 Filed deft's requests to charge

6-15-77 Filed supplemental request to charge

6-15-77 Filed deft's memorandum of law in support of deft's motion to call the prosecution as a defense witness

6-15-77 Filed Govt's memorandum in opposition to deft's motions to call the prosecutor as a defense witness

6-7-77 Deft present w/atty David Gordon of Legal Aid & AUSA Neugarten
Jury trial begun....WERKER, J.

6-8-77 Jury trial continued

6-9-77 " " "

6-10-77 " " "

6-13-77 Jury continued & concluded. Jury deliberations begin

6-14-77 Jury deliberations continued. Jury verdict as follows
Count 1 GUILTY PSI ordered. Sent date adj to 7-20-77 at 9:30 A.M.
in room 1105. Deft continued on bailWERKER, J.

6-20-77 Filed Govt's request for Voir Dire

6-20-77 Filed deft's request for voir dire

6-24-77 Filed Govt's memorandum of law regarding Scienter

7-13-77 Filed Transcript of record of proceedings, dated 3-2-77

7-19-77 Filed Transcript of record of proceedings, dated June 7, 10, 13, 1977

7-28-77 Filed JUDGMENT & COMMITMENT Deft AUSA Neugarten & David Gordon Esq. present The deft is hereby committed to the custody of the Atty General or his authorized representative as a YOUNG ADULT OFFENDER, pursuant to Title 18, United States Code, Section 5010(a) as extended by Title 18, USC Section 4216 on count 1. Imposition of the prison sentence is suspended and the deft is placed on Probation for a period of THREE (3) YEARS, subject to the standing probation order of this Court. Deft is FINED \$2,000 on Count 1. Fine is to be paid at such time and/such amounts as the probation office may direct and if necessary in order to pay such fine, the deft is to sell the motor vehicles which he presently owns. Deft not to be committed for non payment of fine.....WERKER, J. copies issued

7-28-77 Filed notice of appeal from the sentence entered on the 28th day of July 1977 (copy to deft & U.S. Atty)

FINE AND RESTITUTION PAYMENTS

RECEIPT NUMBER	C.D. NUMBER	DATE	RECEIPT NUMBER	C.D. NUMBER

A TRUE COPY
FATNOO 2 RESEARCH CLERK

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

77 CRIM. 0136

UNITED STATES OF AMERICA,

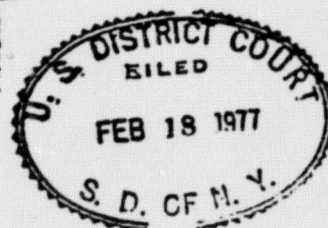
- v -

GJERDJ KALAJ,
LAWRENCE MORICI, and
JAMES JOHNSON,

Defendants.

INDICTMENT

77 Cr.



COUNT ONE

The Grand Jury charges:

1. From on or about November 20, 1976 through December 31, 1976, in the Southern District of New York, GJERDJ KALAJ, LAWRENCE MORICI, and JAMES JOHNSON, the defendants, and others to the Grand Jury unknown, unlawfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate Section 5861 of Title 26, of the United States Code.

2. It was part of said conspiracy that the defendants unlawfully, wilfully and knowingly would transfer firearms, to wit pen guns, in violation of Title 26, United States Code, Section 5812, in that the defendants would not file a written application with the Secretary of the Treasury or his delegate for the transfer and registration of the firearms, would not pay the transfer tax required by Title 26, United States Code, Section 5811, and would not obtain the approval of the Secretary of the Treasury or his delegate for the transfer and registration of the firearm.

3. It was further part of said conspiracy that the defendants unlawfully, wilfully and knowingly would receive and possess a firearm, to wit a pen gun, which was not then identified by a serial number as required by Chapter 53, Title 26 of the United States Code.

4. It was further part of said conspiracy that each defendant unlawfully, wilfully and knowingly would receive and possess a firearm which was not then registered to him in the National Firearms Registration and Transfer Record.

OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts, among others, were committed in the Southern District of New York and elsewhere:

1. In or about late November or early December, 1976 defendant GJERDJ KALAJ had a conversation with Matthew Raffa in the vicinity of 80 West Kingsbridge Road, Bronx, New York about the potential sale of pen guns to Matthew Raffa.

2. On or about December 20, 1976, the defendants GJERDJ KALAJ, LAWRENCE MORICI, and JAMES JOHNSON received 100 pen guns at a bar in the vicinity of 47th Street and 7th Avenue, Brooklyn, New York.

3. On or about December 21, 1976 in the vicinity of 80 West Kingsbridge Road, Bronx, New York the defendant JAMES JOHNSON handed the defendant GJERDJ KALAJ a loaded, unserialized, pen gun.

4. On or about December 21, 1976 in a car in the vicinity of West Kingsbridge Road, Bronx, New York, the defendant GJERDJ KALAJ handed Matthew Raffa a box containing unserialized pen guns.

5. On or about December 21, 1976 in the vicinity of West Kingsbridge Road, Bronx, New York, the defendant GJERDJ KALAJ received approximately \$2400.00 from Matthew Raffa.

6. On or about December 21, 1976 the defendant LAWRENCE MORICI had a telephone conversation in which he asked, in substance, when he would get \$300.

7. On or about December 21, 1976 in the vicinity of 77th Street and 17th Avenue, Brooklyn, New York, the defendant LAWRENCE MORICI received approximately \$300.00 from Matthew Raffa.

(Title 18, United States Code, Section 371.)

COUNT TWO

The Grand Jury further charges:

On or about the 21st day of December, 1976, in the Southern District of New York, the defendant GJERDJ KALAJ, unlawfully, wilfully and knowingly transferred firearms, to wit, 100 pen guns, none bearing any serial numbers, the transfer of said firearms being in violation of Title 26, United States Code, Section 5812, in that the defendant, GJERDJ KALAJ, had not filed a written application with the Secretary of the Treasury or his delegate for the transfer and registration of the firearm, had not paid the transfer tax required by Title 26, United States Code, Section 5811, and had not obtained the approval of the Secretary of the Treasury or his delegate for the transfer and registration of the firearm.

(Title 26, United States Code, Sections 5811, 5812 and 5861(e).)

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COUNT THREE

The Grand Jury further charges:

On or about December 21, 1976 in the Southern District of New York, GJERDJ KALAJ, the defendant, unlawfully, wilfully and knowingly did receive and possess firearms, to wit, 100 pen guns, none of which were identified by serial number as required by Chapter 53, Title 26, United States Code.

(Title 26, United States Code, Section 5861(i).)

COUNT FOUR

The Grand Jury further charges:

On or about December 21, 1976 in the Southern District of New York, GJERDJ KALAJ, the defendant, unlawfully, wilfully, and knowingly did receive and possess firearms to wit, 100 pen guns, none of which were then registered to him in the National Firearms Registration and Transfer Record.

(Title 26, United States Code, Section 5861(d).)

COUNT FIVE

The Grand Jury further charges:

On or about December 21, 1976 in the Southern District of New York, GJERDJ KALAJ, the defendant, unlawfully, wilfully and knowingly did carry a firearm, to wit a loaded Beretta semiautomatic pistol, caliber 7.65mm, serial number 866291, unlawfully during the commission of a felony, to wit a violation of Title 26, United States Code, Section 5861(d)(a) and (i) and a violation of Title 18, United States Code, Section 371, for which the defendant GJERDJ KALAJ may be prosecuted in a court of the United States.

(Title 18, United States Code, Section 924(c)(2).)

COUNT SIX

The Grand Jury further charges:

On or about December 21, 1976 in the Southern District of New York, GJERDJ KALAJ, the defendant, unlawfully, wilfully and knowingly did carry a firearm, to wit a loaded pen gun bearing no serial number, unlawfully during the commission of a felony, to wit a violation of Title 26, United States Code, Section 5861(d)(e) and (i) and a violation of Title 18, United States Code, Section 371, for which the defendant GJERDJ KALAJ may be prosecuted in a court of the United States.

(Title 18, United States Code, Section 924(c)(2).)

COUNT SEVEN

The Grand Jury further charges:

On or about December 21, 1976 in the Southern District of New York, JAMES JOHNSON, the defendant, unlawfully, wilfully and knowingly did carry a firearm, to wit a loaded pen gun bearing no serial number, unlawfully during the commission of a felony, to wit a violation of Title 26, United States Code, Section 5861(i) and a violation of Title 18, United States Code, Section 371, for which the defendant JAMES JOHNSON may be prosecuted in a court of the United States.

(Title 18, United States Code, Section 924(c)(2).)

COUNT EIGHT

The Grand Jury further charges:

On or about December 21, 1976 in the Southern District of New York, JAMES JOHNSON, the defendant, unlawfully, wilfully, and knowingly did receive and possess firearms, to wit 3 pen guns, none of which was identified by serial number as required by Chapter 53, Title 26, United States Code.

(Title 26, United States Code, Section 5861(i).)

Emil St. Louis
FOREMAN

Robert B. Fiske, Jr.
ROBERT B. FISKE, JR.
United States Attorney

June 6, 1977-- Deft. Johnson present w/atty. Mr. Mc Hillicuddy & AUSA Rhea Neugarten. Deft. withdrew his previous plea of not guilty & Pleads Guilty to only. Plea accepted. PSI ordered. Sent. a do 7/18/77 at 9:30 AM. Bail of \$20,000 P.B. cont'd.

June 7, 1977-- Deft. Kalay ^(thru interpreter Mr. Fiquet Janka) present w/atty. Jeff Berns & thru interpreter Mr. Fiquet Janka & deft. Morici present w/atty. David Gordon of Legal Aid & AUSA Rhea Neugarten. Jury trial begun. Werber, J.

June 8, 1977-- Jury trial cont'd. as to defts. Ka & Morici.

June 8, 1977-- Jury trial cont'd. as to depts. Ka
+ Moiri.

June 9, 1977-- Jury trial cont'd. as to depts. Kalij +
Moiri

June 10, 1977-- Jury trial cont'd. as to depts. Kalij +
Moiri

June 13, 1977-- Jury trial cont'd. as to depts. Kalij
Moiri

June 14, 1977-- Jury trial cont'd. & concluded. Jury
deliberations begin. (as to depts. Kalij + Moiri)

June 15, 1977-- Jury deliberations cont'd. Jury

1, 2, 3, 4, 5 + 6

Guilty on all ct.

ct. 1 -- Guilty

9:30 AM

ordered. Sent. date adj. to 7/20/77 at ~~9:30 AM~~ in
105. Dept. Kalaj ordered REMANDED in lieu of

Dept. Morici cont'd. on bail.

Werkner, J.

15, 1977 -- Dept. Johnson sent. date adj. to
7/19/77 at 4:30 P.M. in Rm. 1105.

Werkner, J.

L 19 1977

DEFENDANT JAMES JOHNSON

, AUSA RHEA K. NEUGARTEN & JOHN M. MCGILLICUDDY, Esq. present, sentence TWO (2) YEARS on count 1, pur. to T.18, USC, Sec. 3651 on condition def't be confined in a JAIL or TREATMENT type institution for a period of NINETY (90) DAYS, which is to be served on weekends, such that the time spent in jail shall amount to ninety days. The Probation Dept. shall direct the dates to the Metropolitan Correctional Center as to when the defendant shall start serving his sentence & when he is to be released during the week-end periods. The remainder of the prison sentence is suspended & def't is placed on Probation for a period of TWO (2) YEARS, subject to the standing probation order of this Court -AND- Def't is FINED \$2,000.00 on Count #1. Fine is to be paid at such times & in such amounts as the Probation Office may direct. Def't not to be committed for non-payment of fine. Counts 7 & 8 DISMISSED.

July 20, 1977

WERKNER, J.

Defendant GJERDJ KALAJ, AUSA R.K. Neugarten & Jeff Bernstein, Esq. present sentence on count #1 to FIVE (5) YEARS pur. to T.18, USC, Sec. 3651 serve SIX (6) MONTHS on WEEKENDS. Execution of remainder of prison sentence suspended & def't placed on probation for THREE (3) YEARS. -AND- Def't FINED \$5,000.00 on count 1. Fine to be paid as directed by Probation. NON-COMMITTED FINE. Sentence on counts 2, 3, 4, 5 & 6 to THREE (3) YEARS probation to run concurrently with each other & concurrently with term imposed on count #1. Def't to receive credit for time already served. Def't ROR until directed by Probation to report for service of sentence. WERKNER

JUL 28 1977

Defendant LAWRENCE MORICI, AUSA Neugarten & David Gordon, Esq. present sentence on count #1 under YOUTH CORRECTION ACT as extended. DISPOSITION OF prison sentence is suspended. Probation for THREE (3) YEARS. FINED \$2,000.00 NON-COMMITTED. WERKNER, J.

United States District Court
SOUTHERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA

vs.

GJERDJ KALAJ,
LAWRENCE MORICI, and
JAMES JOHNSON

Defendants.

INDICTMENT

77 Cr.

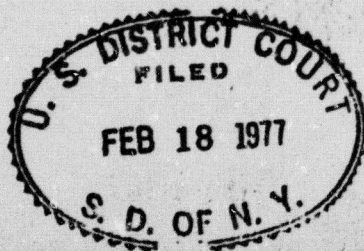
ROBERT B. FISKE, JR.

United States Attorney.

A TRUE BILL

Errol H. Hunt

Foreman.



February 18, 1977 - Filed Indictment -
January 24, 1977

Dept. Gjerdj Kalaj (att: Charles A. Deilini)
Court directs a not guilty plea be entered.
Bail \$5000. OAB secured by \$500. cash,
Continued.

Dept. Lawrence Morici - no
appearance by defendant. B/W ordered.
Court directs a not guilty plea be
entered.

Dept. James Johnson (att: John M.
McGillichuddy present) pleads not guilty.
Bail \$20,000. OAB, continued. Foreign
Worker for all purposes. Markel

MAR 2 - 1977

All Defs present without counsel.
Bench Warrant vacated.

KALAJ + MORICI sent to Magistrate to appoint counsel.
All Defendants + Counsel to appear on March 9, 1977 at 4:30 P.M.
JUDGE WERKER

USA vs 1
Kalaj, et al. 2
77 Cr. 136 2
(HFW)
6/14/77 3
Hon. 4
H.P. 4
Werker

mdrf 1

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CHARGE OF THE COURT

(After recess.)

THE CLERK: The Court is about to charge the jury. Any spectator who wishes to leave the courtroom will do so now or you will have to remain seated until the completion of the Court's charge.

THE COURT: I am using this microphone, ladies and gentlemen, because I think you may not be able to hear me above the din outside.

Mr. Foreman and ladies and gentlemen of the jury. Now that the evidence is all in and counsel have summed up their respective contentions the time has come for you and me to perform our respective functions in the administration of justice in this case.

As I stated to you at the outset, it is my duty to instruct you as to the principles of law to be followed, and it is your duty to accept those instructions as they are given by me and apply them to the evidence in this case.

The indictment against these defendants is not evidence, and it does not carry with it any presumption of guilt. It is merely a means by which the defendants and the jury are informed of the nature of the charges or accusations and the means of bringing the defendants

1 mdrf 2

2 to trial.

3 The defendants in this case have pleaded not
4 guilty, and by that plea have put in issue each of the
5 elements of the charges against them. You may not give
6 any weight whatever to the fact that an indictment has
7 been returned against the defendants. It is your duty
8 to determine the facts as derived from your consideration
9 of the evidence in this case and then applying the
10 principles of law to decide whether each of the defendants
11 on trial before you is guilty or not guilty of any
12 of the charges made against him.

13 You are the sole and exclusive judges of the
14 facts. If your recollection of the evidence differs in
15 any way from the recollection of counsel or the Court,
16 your recollection controls and should be relied on by you.
17 Your judgment as to what the facts are controls. The
18 government and these defendants are equally entitled
19 to justice in this court. The fact that this prosecution
20 is brought in the name of the United States of America
21 does not entitle the government to any greater consideration
22 than any other litigant would get. But by the same
23 token it is entitled to no less consideration.

24 The issues in this case must be decided on the
25 evidence and on the law. In this regard you are instructed

1 mdrf 3

2 that the statements and arguments of counsel are not
3 evidence unless made as an admission or a stipulation of
4 fact.

5 Also, in proving the charges against the two defendants
6 on trial before you the government introduced evidence of
7 the acts and declarations of a third defendant who is not
8 on trial here. You may not draw any inference favorable
9 or unfavorable towards the government or the defendants on
10 trial from the fact that the third defendant is not on
11 trial before you now. You are not to speculate as to the
12 reasons why he is not on trial. Those matters are wholly
13 outside your concern and have no bearing on your function
14 as jurors.

15 Before I turn to the indictment in the case, and
16 the charges that are made against the defendants here,
17 let me first give you a few basic principles that should
18 govern you in your deliberations.

19 First of all, you should approach your duty with
20 an attitude of complete fairness and impartiality, one
21 in which you reach your decision solely on the basis of
22 the evidence and in accordance with the legal instructions
23 I am about to give you.

24 Under your oath as jurors you should not and
25 cannot allow sympathy for the defendants or consideration

1 mdrf 4

2 of punishment they might receive should they be found
3 guilty to enter into your deliberations or to affect
4 or influence your judgment in any way.

5 The duty of imposing sentence in the event
6 of a conviction would rest exclusively upon the Court
7 and upon the Court's own conscience.

8 During the trial I have been called upon to
9 make rulings from time to time, and I have sustained
10 some objections, I have overruled others. On one or two
11 occasions I may have ordered testimony stricken and have
12 advised you to disregard it. It is important in the
13 performance of your duties that you limit your
14 consideration of the evidence to that which was actually
15 received in the case and not give any consideration
16 to any evidence which was stricken.

17 It is equally important that you don't draw
18 inferences against either side because of any objections
19 that their counsel may have made during the trial or
20 any arguments that counsel may have made, or the fact
21 that it may have been necessary from time to time to engage
22 in conferences at the side bar or to exclude you from
23 the courtroom altogether.

24 Under our system of justice in this country it
25 is the function and duty of counsel to object to anything

1 mdrf 5

2 that they think is legally improper, and they would be
3 remiss in their duty if they failed to do so. But it is
4 my function and duty to rule on these questions of law,
5 and I would be remiss in my duty, too, if I failed to make
6 such rulings, even though sometimes they may not have
7 been to the liking of counsel for either side.

8 If during the course of the trial from my rulings
9 or questions or facial expressions on some of the questions
10 or some of the questions I put to the witnesses you got
11 the impression that I personally have any views on the
12 credibility of any of the witnesses or on the weight to
13 be given to their testimony, or to the proof, or to the
14 merits of the case, please disregard it. It is not my
15 intention to imply or express any opinion or any views
16 to you with respect to the facts in this case or the merits
17 or the credibility of any witness. That is your sole and
18 exclusive function.

19 Any questions which I may have put to witnesses
20 during the course of the trial have been put to those
21 witnesses in an attempt to clarify issues which you might
22 ultimately decide. It was not to give you the impression
23 that I was siding one way or another. Whatever my feelings
24 may be in this matter are completely immaterial. Let
25 me give you a few more basic principles of general application

1 mdrf 6

2 As I have indicated, no inference is to be
3 drawn from the indictment or from the fact an indictment
4 has been filed.

5 The grand jury was not asked to determine whether
6 these defendants were guilty or not guilty of the charges
7 contained in the indictment. That is your function as
8 jurors, and your function alone.

9 Under our law every defendant, and that is true
10 of the defendants in this case, is presumed to be innocent.
11 That presumption of innocence is in each defendant's favor
12 throughout the entire trial and extends even into your
13 deliberations in the jury room. It is overcome only if,
14 as and when you determine that his guilt has been established
15 beyond a reasonable doubt by the credible evidence in the
16 case.

17 The burden is upon the government to establish
18 each defendant's guilt beyond a reasonable doubt, and that
19 burden applies to every element of each crime charged
20 against each defendant. That burden of proof never shifts
21 to the defendant, it always remains with the government
22 right down to the end of the trial.

23 I have⁵ mentioned the term "beyond a reasonable doubt."
24 What does that mean? As the words imply, it is such a
25 doubt as will be entertained by a reasonable man after

mdrf 7

all the evidence in the case is carefully analyzed, compared and weighed. A reasonable doubt may arise not only from the evidence produced but also from a lack of evidence. Since the burden is upon the government to prove each defendant guilty beyond a reasonable doubt of every essential element of each crime charged, a defendant has the right to rely upon a failure of the prosecution to establish such proof.

Absolute or mathematical certainty is not required, but there must be such certainty as satisfies your reason and judgment, and such that you feel conscientiously bound to act upon. It is not a fanciful doubt or a whimsical or capricious doubt, for anything relating to human affairs and depending upon human testimony is open to some possible or imaginary doubt.

A reasonable doubt is such doubt as would cause a prudent person to hesitate before acting in matters of importance to him. In other words, if the evidence warrants, in your judgment, the conclusion that a defendant is guilty so as to exclude every other reasonable conclusion, you should declare him guilty.

On the other hand, if on all the evidence you have a reasonable doubt as to the guilt of the defendant you must find him not guilty.

1 mdrf 8

2 Whenever in these instructions I tell you that
3 a certain element must be established before there can be
4 a conviction of a defendant on a certain count, I mean
5 that this element must be established according to the
6 standard of proof I have just explained. That is, proof
7 beyond a reasonable doubt.

8 That standard applies to every finding that
9 is essential to a conviction of either defendant on any
10 count. If I don't repeat that standard of proof each time
11 bear in mind that it applies every time I speak to you
12 about an element of the offense or a finding that you are
13 entitled to make.

14 So with respect to all such elements or findings
15 necessary for conviction on any count I instruct you that
16 you may not conclude that such an element or such a finding
17 is established simply because you may think the weight
18 of the evidence tips somewhat in favor of the government.
19 The standard of proof is proof beyond a reasonable doubt.

20 The indictment in this case contains six counts.
21 Count 1 charges the defendants with conspiracy, and
22 Counts 2 through 6 charge the defendant Gjerdj Kalaj
23 alone with what lawyers call substantive counts. Each
24 of these counts charges a separate offense or crime and
25 must be considered separately.

1 mdrf 9

2 The indictment names three defendants. Only
3 two defendants, Lawrence Morici and Gjerdj Kalaj, are
4 on trial before you. They are the only persons whose guilt
5 or innocence you must announce in your verdict. Although
6 as I will explain to you shortly in considering their
7 guilt or innocence you may have to determine the nature
8 of the participation, if any, of the other named defendant,
9 James Johnson.

10 In determining whether a given defendant is
11 guilty or not guilty you must bear in mind that guilt is
12 personal. Thus, whether each of the two defendants on
13 trial before you is guilty or not guilty of each of the
14 various counts in the indictment in which the particular
15 defendant is named must be determined separately with
16 respect to him and solely on the evidence presented
17 against him or the lack of evidence.

18 The case of each particular defendant stands
19 or falls upon the proof or lack of proof of the charges
20 against him and not against somebody else.

21 Let us turn to the specific charges against
22 the defendants. The first count charges a conspiracy.
23 It charges that the defendants here on trial, together
24 with other co-defendants, conspired to violate the Federal
25 Gun Control Laws with respect to the transfer of firearms,

1 mdrf 10

2 specifically pen guns, and with respect to the registration
3 and serialization of pen guns.

4 As I already mentioned, Counts 2 through 6
5 are substantive counts. The conspiracy count charges the
6 defendants with conspiring to commit offenses while
7 the substantive counts charge the defendant Gjerdj Kalaj
8 alone with the actual commission of them -- that is,
9 with actually carrying out those alleged offenses,
10 as well as other alleged offenses.

11 Thus, Count 2 charges that Gjerdj Kalaj
12 unlawfully, intentionally, and knowingly transferred 100
13 serialized pen guns without paying the federal transfer
14 tax or applying to the Secretary of the Treasury for
15 permission to transfer same.

16 Count 3 charges Gjerdj Kalaj unlawfully, willfully
17 and knowingly received and possessed 100 unserialized
18 pen guns.

19 Count 4 charges that Gjerdj Kalaj unlawfully,
20 willfully and knowingly received and possessed 100 pen
21 guns none of which were registered to him in the
22 National Firearms Registration and Transfer Record.

23 In addition, Gjerdj Kalaj is charged with two
24 more substantive offenses. In Count 5 he is charged with
25 unlawfully, willfully and knowingly carrying a loaded
Baretta semi-automatic pistol unlawfully during

1 mdrf 11

2 the commission of a federal felony.

3 And in Count 6 Gjerdj Kalaj is charged with
4 unlawfully, willfully and knowingly carrying a loaded
5 unserialized pen gun unlawfully during the commission
6 of a federal felony.

7 Since the essential elements which the government
8 must prove before conviction may be had on the substantive
9 counts differ from the essential elements of the crime of
10 conspiracy we shall consider each separately.

11 I believe it will be somewhat clearer for you
12 if I first discussed the conspiracy count, that is Count 1,
13 of the indictment.

14 There is a difference of which you should be
15 made aware between the conspiracy count and the substantive
16 counts before you. A conspiracy to commit a crime is an
17 entirely separate and different offense from the substantive
18 crime which may be the objective of the conspiracy.

19 Conspiracy is collective criminal activity or
20 an agreement or understanding to violate other laws.
21 It presents a greater potential threat to the public
22 and is usually more difficult to detect than the illicit
23 or criminal activity of a single individual. Thus,
24 if a conspiracy exists, even if it should fail of its
25 purpose, it is still punishable as a crime.

1 mdrf 12

2 Consequently, in a conspiracy count there is no
3 need to prove that pen guns were ever actually transferred
4 by the defendants or that they actually possessed pen guns.
5 As I have said in Count 1 both of the defendants are charged
6 with conspiracy in violation of Section 371 of Title 18,
7 United States Code. That section provides in part that,
8 "If two or more persons conspire to commit any offense
9 against the United States and one or more of such persons
10 do any act to affect the object of the conspiracy
11 each" is guilty of a crime.

12 Thus, the indictment charges in Count 1 that,
13 "From and on or about February 20, 1976, through December
14 31, 1976, in the Southern District of New York, Gjerdj
15 Kalaj, Lawrence Morici and James Johnson, the defendants
16 and others to the grand jury unknown, unlawfully, intentionall
17 and knowingly combined, conspired, confederated and
18 agreed together and with each other to violate Section
19 5861 of Title 26 of the United States Code.

20 Two: It was part of said conspiracy that the
21 defendants unlawfully, willfully and knowingly would
22 transfer firearms, to wit pen guns, in violation of
23 Title 26, United States Code, Section 5812 in that
24 the defendants wouldn't file a written application with
25 the Secretary of the Treasury, or his delegate, for the

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transfer and registration of the firearms, wouldn't pay the transfer tax required by Title 26, United States Code, Section 5811, and wouldn't obtain the approval of the Secretary of the Treasury or his delegate for the transfer and registration of the firearm.

Three: It was further part of said conspiracy that the defendants unlawfully, willfully and knowingly would receive and possess a firearm, to wit a pen gun, which was not then identified by a serial number as required by Chapter 53, Title 26, United States Code.

Four: It was further part of said conspiracy that each defendant unlawfully, willfully and knowingly would receive and possess a firearm which was not then registered to him in the National Firearms Registration and Transfer Record.

The indictment goes on to list seven overt acts allegedly committed in furtherance of the conspiracy. I will read those to you in a little while.

In order to find one of the defendants guilty of conspiracy as charged in the first count of the indictment you must find as to that defendant each of the following elements beyond a reasonable doubt.

First, that at sometime during the period from on or about November 20, 1976, through December 31, 1976,

1 in the Southern District of New York an agreement existed
2 among the named defendants and others, or between any
3 two such persons.
4

5 Second, that it was an object of this agreement
6 for the defendants to unlawfully transfer firearms
7 without having filed a written application to do so,
8 without having paid the required transfer tax, and without
9 approval of the Secretary of the Treasury or his delegate
10 or to unlawfully receive or possess a firearm not
11 identified by a serial number, or for each of them to
12 receive and possess a firearm not then registered to him
13 in the National Firearms Registration and Transfer Record.

14 Third: That the defendant knowingly associated
15 himself with the conspiracy and participated in it.

16 Fourth: That one of the conspirators, not
17 necessarily a defendant, knowingly committed at least one
18 of the overt acts set forth in the indictment at or about
19 the time and place alleged.

20 Now, what is a conspiracy? A conspiracy is a
21 combination or agreement of two or more persons to accomplish
22 a criminal or unlawful act by concerted action through
23 criminal or unlawful means.

24 The gist of the crime of conspiracy is the unlawful
25 combination or agreement to violate the law.

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Whether or not either defendant accomplished what it is alleged he conspired to do is immaterial to the question of whether he is guilty or not guilty. A conspiracy has sometimes been called a partnership in criminal purposes in which each member becomes the agent of every other member. However, to establish that a conspiracy existed the government is not required to show that two or more persons sat around a table and entered into a solemn compact orally or in writing, stating that they have formed a conspiracy to violate the law, setting forth the details of the plans, the means by which the unlawful project is to be carried out, or the part to be played by each conspirator.

Indeed, it would be extraordinary if there were such a formal document or specific oral agreement. Your common sense will tell you that when people in fact undertake to enter into a criminal conspiracy much is left to unexpressed understanding; conspirators don't usually reduce their agreement to writing or acknowledge it before a notary public nor do they publicly broadcast their plans. From its very nature conspiracy is almost always characterized by secrecy, rendering detection difficult.

Thus, it is sufficient if two or more persons in some manner or through some contrivance impliedly

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2 or tacitly come to a common understanding to violate the
3 law.

4 To simplify this perhaps a bit more, success
5 in carrying out the objective of the venture, if you believe
6 it was successful, may serve as proof that there was a
7 common venture or agreement.

8 In determining whether there has been an unlawful
9 agreement you may judge acts and conduct of the alleged
10 members of the conspiracy which are done to carry out an
11 apparent criminal purpose. The adage actions speak louder
12 than words is applicable here.

13 Usually, the only evidence available is that
14 of disconnected acts on the part of the alleged individual
15 conspirators, which acts, however, when taken together
16 in connection with each other and with the reasonable
17 inferences flowing from them show a conspiracy or agreement
18 to secure a particular result as satisfactorily and
19 conclusively as more direct proof.

20 If after consideration of all the evidence you
21 find beyond a reasonable doubt that the minds of at least
22 two of the alleged conspirators -- that is, any two-- met
23 in an understanding way and that they agreed, as I have
24 explained the conspiratorial agreement to you, to work in
25 furtherance of the unlawful scheme alleged in the

1 mdrf 17

2 indictment then proof of the existence of a conspiracy
3 is established.

4 A conspiracy once formed is presumed to have
5 continued until its objectives are accomplished or there
6 is an affirmative act or termination by its members.
7 So, too, once a person is found to be a member of a conspiracy
8 he is presumed to continue his membership until its
9 termination unless there is affirmative proof offered
10 of withdrawal or disassociation.

11 If you find that a conspiracy existed it
12 is not required that the government prove that all the means
13 in the indictment of furthering it in fact were brought
14 to play. If you find that one or more of the means
15 were used to achieve an objective that would be sufficient.

16 The indictment charges that the conspiracy
17 existed from on or about the 20th day of November 1976
18 through December 31, 1976. You need not find that the
19 conspiracy began and ended exactly on those dates. If
20 you find at sometime during this period the conspiracy
21 existed, that is sufficient.

22 You must also find, however, that the conspiracy
23 existed at least in part in the Southern District of
24 New York. This element will be met if you find that any
25 one or more significant conspiratorial acts occurred

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within that area which includes the Bronx. Once you are satisfied that the conspiracy charged existed you must ask yourself whether each defendant whose guilt you are considering was a member.

In deciding whether the defendant was a member of the conspiracy you should consider whether on all the evidence the defendant knowingly and purposely entered that conspiracy.

In determining whether the defendant became a member of the conspiracy you must determine not only whether he participated in it but whether he did so with knowledge of its unlawful purpose. Did he join with an awareness of at least some of the basic aims and purposes of the conspiracy?

Knowledge is a matter of inference from proven facts, Science has not devised a way to permit us to enter into a man's mind, and to know with exactitude what he knows or thinks.

However, you do have before you evidence of certain acts on the part of each defendant. The government contends that these acts show beyond a reasonable doubt knowledge on the part of that defendant of unlawful purpose. It is not necessary that the defendant be fully informed as to the details of the scope of the conspiracy in order to justify any planning of knowledge on his part.

1
2 To have guilty knowledge, the defendant need
3 not know the full extent of the conspiracy and all of
4 its details and actors.

5 I want to caution you that mere association
6 with one or more of the conspirators does not make one
7 a member of the conspiracy, nor is knowledge without
8 participation sufficient.

9 What is necessary is that the defendant
10 participate with knowledge of at least some of the
11 purposes of the conspiracy and with the intent to aid in
12 the accomplishment of these unlawful acts.

13 Let me also caution you that you do not
14 have to find before you may consider a particular defendant
15 a member of the conspiracy that he knew that the basic
16 purposes and objectives of the conspiracy constituted
17 a violation of federal law, nor do you have to find
18 that the acts which constituted his participation in the
19 conspiracy were themselves substantive violations of
20 the law.

21 Once you have found the conspiracy to exist
22 and the defendant to have knowingly participated in it
23 the extent of his participation has no bearing on his
24 guilt or innocence. The guilt of a conspirator is not
25 measured by the extent or duration of his participation.

1
2 Even if he participated in it to a degree more limited
3 than that of his coconspirators, he is equally culpable
4 so long as he was in fact a conspirator. In other words,
5 it is not necessary for a conspirator to have joined
6 the conspiracy at its outset; he may join it at any
7 point in its progress and still be held responsible for
8 all that was done before he joined and all that may be
9 done thereafter during the conspiracy's existence and
10 while he remains a member.

11 Moreover, once you are satisfied beyond a
12 reasonable doubt that a conspiracy existed and that a
13 defendant on trial was a member, then the acts and
14 declarations of any other person found to be a member,
15 whether a defendant here on trial or any other defendant
16 not on trial, made during its pendency and in furtherance
17 of its objectives are considered the acts and declarations
18 of all other members even though they were not present.

19 Therefore, statements of any conspirator
20 which are not in furtherance of the conspiracy or made
21 before its existence or after its termination may be con-
22 sidered as evidence only against the person making it.
23 All of the conspirators need not be acquainted with each
24 other. They may not have previously associated together.
25 Indeed, one of the defendants may know only one other

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member of the conspiracy. But if he enters into an unlawful agreement with that other member of the conspiracy to effectuate some purpose of the conspiracy, he becomes a party to the conspiracy.

If you find that a conspiracy existed, that it had at least one of the objectives which I have discussed, and that the defendant was a member of the conspiracy, there is a fourth element to consider. That is the requirement of an overt act. You may not find the defendant guilty of conspiracy unless and until you are convinced beyond a reasonable doubt that at least one overt act charged in the indictment was committed by at least one of the conspirators in the Southern District of New York. That is for present purposes in the Bronx.

The offense of conspiracy is complete when the unlawful agreement is made and any overt act is done by a conspirator to effect the object of the conspiracy.

Hence, the overt act required is one which furthers the objectives or purposes of the conspiracy. It does not have to be a criminal act or an act which of itself constitutes an objective of the conspiracy.

In fact, it may be an act which is innocent on its face but it must be of such character that it furthers or promotes or aids or assists in accomplishing

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a purpose of the conspiracy.

It is not necessary for you to find that all of the alleged overt acts charged in the indictment were committed, nor is it necessary that an overt act implicate a defendant on trial before you. Nor do you have to find that either of the defendants had something to do with the overt act committed. It is enough if you find that at least one of the named overt acts charged in the indictment was committed in furtherance of the conspiracy by any one of the conspirators.

With this in mind, let me read to you the overt acts which are charged in the indictment.

The government must prove that at least one of the overt acts was committed in furtherance of the conspiracy.

In or about late November or early December, 1976, defendant Gjerdj Kalaj had a conversation with Matthew Raffa in the vicinity of 80 West Kingsbridge Road, Bronx, New York, about the potential sale of pen guns to Matthew Raffa.

2. On or about December 20, 1976, the defendants Gjerdj Kalaj, Lawrence Morici and James Johnson received 100 pen guns at a bar in the vicinity of 47th Street and Seventh Avenue, Brooklyn, New York.

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3. On or about December 21, 1976, in the vicinity of 80 West Kingsbridge Road, Bronx, New York, the defendant James Johnson handed the defendant Gjerdj Kalaj a loaded unserialized pen gun.

4. On or about December 21, 1976, in a car in the vicinity of West Kingsbridge Road, Bronx, New York, the defendant Gjerdj Kalaj handed Matthew Raffa a box containing unserialized pen guns.

5. On or about December 21, 1976, in the vicinity of West Kingsbridge Road, Bronx, New York, the defendant Gjerdj Kalaj received approximately \$2,400 from Matthew Raffa.

6. On or about December 21, 1976, the defendant Lawrence Morici had a telephone conversation in which he asked, in substance, when he would get \$300.

7. On or about December 21, 1976, in the vicinity of 77th Street and 17th Avenue, Brooklyn, New York, defendant Lawrence Morici received approximately \$300 from Matthew Raffa.

You are instructed that a conspiracy once formed is presumed to have continued until its objectives are accomplished or that there is an effective termination act by its members as I have already told you.

Turning to the substantive counts, only defendant

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Kalaj is named in them. Let us look at Count Two.

Count Two of the indictment charges the defendant Kalaj with violating Title 26, U. S. Code, Section 5826(e), which provides that "It shall be unlawful for any person (e) to transfer a firearm in violation of the provisions of this chapter."

Included among the provisions of this chapter are Sections 5811 and 5812 of Title 26, U. S. Code.

Section 5811 relating to transfer taxes provides as follows:

"(a) Rate: There shall be levied, collected and paid on firearms transferred a tax at" -- and then they specify a rate.

"(b) By whom paid: The tax imposed by Subsection (a) of this section shall be paid by the transferrer.

"(c) Payment: The tax imposed by Subsection (a) of this section shall be payable by appropriate stamps prescribed for payment by the Secretary of the Treasury or his delegate."

Section 5812 provides in part as follows:

"(a) Application: A firearm shall not be transferred unless (1) the transferrer of the firearm has filed with the Secretary" -- again of the Treasury -- "or his delegate a written application in duplicate for the

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transfer and registration of the firearm to the transferee on the application form prescribed by the secretary or his delegate.

"(2) Any tax payable on the transfer is paid as evidence by the proper stamp affixed to the original application form," and

"(6) The application form shows the Secretary or his delegate has approved the transfer and the registration of the firearm to the transferee."

Accordingly, in order to find the defendant Kalaj guilty of illegally transferring the firearm as charged in Count Two, it is necessary for you to find beyond a reasonable doubt each of the following four elements:

First: That on or about December 21, 1976, he transferred a firearm, as that term will be defined;

Second: That the transfer occurred in the Southern District of New York;

Third: That the transfer was in violation of law because defendant Kalaj had not filed a written application with the Secretary of the Treasury or his delegate for the transfer and registration of the firearm, had not paid the transfer tax or had not obtained the approval of the Secretary of the Treasury or his delegate

for the transfer and registration of the firearm.

And, fourth: That the transfer was unlawful, willful and knowing.

The term transfer is defined by Title 26, U. S. Code, Section 5845 (j) as follows:

"The term transfer and various derivatives of such word shall include selling, assigning, pledging, leasing, loaning, giving away, or otherwise disposing of."

The term firearm is defined by Title 26, U. S. Code, Section 5845 (a) to include in pertinent part:

"Any other weapon as defined in Subsection (e)."

Subsection (e), in turn, defines any other weapon in pertinent part as any weapon or device capable of being concealed on the person from which a shot can be discharged through the energy of an explosive.

To satisfy the first element of Count Two, you must find that the 100 pen guns mentioned therein are firearms, and that they were transferred as I have defined those terms.

The second element requires a finding that this transfer took place in the Southern District of New York, which again includes the Bronx.

As to the third element of the second count, in order to convict the defendant Kalaj of the crime

1 mdrp 9

2 charged in Count Two, you must be satisfied beyond a
3 reasonable doubt that at least one firearm was trans-
4 ferred without a written application having been filed
5 with the Secretary of the Treasury, or his delegate, for
6 the transfer and registration of the firearm or without
7 the tax due and payable on the transfer of the firearm
8 having been paid, or without approval of the Secretary
9 of the Treasury or his delegate having been secured for
10 the transfer and registration of the firearm.

11 I instruct you that these requirements are
12 stated in the alternative. You may find this third ele-
13 ment if you are satisfied that an application had not
14 been filed, or that the tax had not been paid, or that
15 the necessary approval had not been obtained.

16 You need not find that all three omissions
17 occurred in order to convict.

18 The final element of the crime charged in
19 Count Two is that the defendant has acted knowingly and
20 willfully in transferring the pen guns.

21 You will remember that an act is done knowingly
22 and willfully if it is done voluntarily and purposely.
23 An act is done willfully and unlawfully if it is done
24 with an evil intent or purpose. You may find that the
25 defendant acted knowingly and willfully if he acted

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voluntarily and purposely and not because of mistake or inadvertence or any other innocent reason.

However, willfully does not mean that the defendant, in addition to knowing what he is doing, must also suppose that he is breaking the law; for ignorance of the law is no excuse.

Knowledge and intent exist in the mind.

Since it is not possible to look into a man's mind to see what went on, the only way you have for arriving at a decision in these questions is for you to take into consideration all the facts and circumstances shown by the evidence, including the exhibits, and to determine from all such facts and circumstances whether the requisite knowledge and intent were present at the times in question.

Direct proof is unnecessary. These questions of knowledge and willfulness, like all other questions of fact, are solely for you to determine. Medical science has not as yet devised an instrument by which you can go back and determine what the purpose was in one's mind when he performed certain acts. Rarely is direct proof available that one had knowledge of a fact or intended to bring about a result.

Accordingly, intent, willfulness, and knowledge, are usually established by surrounding facts and circumstances as of the time the acts occurred or events took

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2 place, and the reasonable inferences to be drawn therefrom.

3 This is referred to as circumstantial evidence.

4 I further instruct you that you are not required to find
5 that the defendant knew that an application for the transfer
6 of registration of firearms had not been filed or was
7 required to be filed with the Secretary or with his dele-
8 gate, or that the defendant knew the tax due and payable
9 on the transfer of a firearm had not been paid or was
10 required to be paid, or that the defendant knew that the
11 approval of the Secretary and his delegate for the
12 transfer and registration of a firearm had not been secured
13 or was required to be secured.

14 It is sufficient if you find that the defendant
15 transferred at least one pen gun with an awareness of
16 what it was. The defendant Kalaj is charged in Count
17 Three with having violated Title 26, U. S. Code, Section
18 35861 (i), which in part provides that it shall be unlawful
19 for any person to receive or possess a firearm which is
20 not identified by a serial number as required by this
21 chapter.

22 Elsewhere in the chapter it is stated that
23 each manufacturer and importer, and anyone making a
24 firearm, shall identify each firearm manufactured, imported
25 or made, by a serial number which may not be readily

removed, obliterated or altered.

The chapter further provides that any person who possesses a firearm which does not bear the serial number and other information required by the subsection which I just read shall identify the firearm with a serial number assigned by the Secretary of the Treasury or his delegate.

In other words, to find the defendant Kalaj committed the offense charged in Count Three, you must find beyond a reasonable doubt each of the following four elements.

First, that on or about December 21, 1976, he received or possessed a firearm as I already defined that term for you in connection with Count Two.

Second, that this took place in the Southern district of New York, that is for present purposes in the Bronx.

Third, that the firearm received or possessed was not identified by a serial number in the manner required by the statute.

Fourth, that the receipt or possession was unlawful, willful and knowing.

I have already defined a firearm for you in connection with Count Two; and that definition applies

to Count Three as well.

If you find beyond a reasonable doubt that at least one of the pen guns allegedly involved here was a firearm as that term has been defined for you, then you must determine whether or not on or about December 21, 1976, defendant Kalaj received or possessed it.

To receive an article is to take it into possession and control. That is to accept custody of it. The word "possess" has its everyday common meaning. That is, to have something within one's control either actually or constructively. Thus, a person who knowingly has direct physical control of a substance, such as a pen gun at a given time, is then in actual possession of it. And a person who although not in actual possession knowingly has both the power and the intention at a given time to exercise dominion or control over a thing either directly or through another person or persons is then in constructive possession of it.

The possession element is therefore met if you find that the defendant Kalaj had actual or constructive possession of a pen gun.

The third element requires a finding that at least one of the pen guns lacked the required serial numbers. There does not appear to be any dispute as to

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2 this, but you must still find it to be the case before
3 you may return a verdict of guilty on this count.

4 Finally, the fourth element, that defendant
5 Kalaj possessed at least one of the pen guns willfully
6 and knowingly has already been explained to you for
7 willfully and knowingly have the same meaning in Count
8 Three as they did in Count Two.

9 Again, I instruct you that the requirement of
10 proving that the defendant acted knowingly does not
11 make it necessary for the government to show that the
12 defendant knew about the serialization provisions of the
13 law or that the defendant's pen guns had physical charac-
14 teristics which might make them subject to serialization.

15 Accordingly, to satisfy this element, if you
16 find that Kalaj possessed at least one of the 100 pen guns,
17 you need only find that the defendant was aware of what it
18 was.

19 Turning to Count Four of the indictment, the
20 defendant Kalaj is charged with having violated Title 26,
21 U. S. Code, Section 5861 (d), which in part provides
22 that it shall be unlawful for any person to receive or
23 possess a firearm which is not registered to him in the
24 National Firearms Registration and Transfer Record.

25 In order to find that the defendant Kalaj

committed the offense charged in Count Four, you must find beyond a reasonable doubt each of the following four elements:

First, that on or about December 21, 1976, he received or had possession of a firearm;

That such receipt or possession took place in the Southern District of New York;

Third, that the firearm which he received or possessed was not then registered to him in the National Firearms Registration and Transfer Record;

Fourth, that his receipt or possession was unlawful, willful and knowing.

I have already defined the term firearm in connection with Count Two, and the terms receive and possess in connection with Count Three. Those definitions apply to Count Four as well. And as in the other counts you are instructed that the Bronx is located within the Southern District of New York.

The third element of Count Four requires a finding that at least one of the pen guns was not registered to defendant Kalaj in the National Firearms Registration and Transfer Record. Although this does not seem to be in dispute, you are instructed that you must still find it to be the case beyond a reasonable doubt before you

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2 may return a verdict of guilty on this count.

3 The evidence in this case includes the testimony
4 of Charles Baum that after diligent search of the National
5 Firearms Registration and Transfer Record, no record was
6 found that any firearm was registered to Kalaj. From this
7 testimony you may find that the government has sustained
8 its burden of proving non-registration of the weapon
9 beyond a reasonable doubt.

10 However, it is for you to determine what
11 evidence you will accept and what weight you will attach
12 to it.

13 The fourth element, that defendant Kalaj
14 received and possessed at least one pen gun willfully and
15 knowingly, has already been explained to you, and the
16 terms willfully and knowingly have the same meaning in
17 Count Four that they had in Count Two.

18 Again, I instruct you that the government need
19 not show that the defendant knew about the registration
20 provisions of the law or that he knew the pen gun had
21 physical characteristics that might make it subject to
22 registration. It is only necessary for you to find that
23 the defendant knew what the object in his possession was.

24 The fifth count in this indictment charges
25 the defendant with carrying a firearm during the commission

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2 of a felony. The applicable law, Section 924 (c) (2)
3 of Title 18, U. S. Code, reads as follows:

4 "Whoever carries a firearm unlawfully during
5 the commission of any felony for which he may be prosecuted
6 in a court of the United States shall be guilty of a crime."

7 Before the defendant Kalaj can be convicted
8 on Count Five, the government must prove beyond a reason-
9 able doubt each of the following elements:

10 First, that the defendant was committing a
11 felony on or about the 21st day of December, 1976;

12 Second, that during the commission of the
13 felony, he was carrying a firearm;

14 Third, that he was carrying the firearm unlaw- :
15 fully; and

16 Fourth, that the defendant acted knowingly
17 and willfully.

18 The first element of the Count Five you must
19 consider is whether the defendant was committing a federal
20 felony on or about December 21, 1976. In this regard,
21 I instruct you as a matter of law that each crime charged
22 in Counts One through Four is a crime which may be
23 prosecuted in a court of the United States, that is, a
24 federal felony. Thus, if you find either (1) that the
25 defendant Kalaj conspired to violate the gun control

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2 statutes, or (2) that he violated the transfer provisions
3 of the gun control statutes, or (3) that he violated the
4 serialization provisions of those statutes, or (4) that
5 he violated the registration provisions of those statutes,
6 that is, if you find the defendant guilty of one of the
7 crimes charged in Counts One through Four, the first element
8 of Count Five is established and you need not find him
9 guilty of more than one of the first four counts to
10 satisfy this element.

11 However, if you find the defendant Kalaj not
12 guilty of the crimes charged in each and all of the Counts
13 One through Four, then you must find him not guilty of
14 Count Five.

15 The second element which you must consider is
16 whether the defendant was carrying a firearm during the
17 commission of one of the felonies charged in Counts One
18 through Four of the indictment.

19 Under Count Five of the indictment, the object
20 alleged to be a firearm is a Baretta semi-automatic pistol.
21 For purposes of Counts Five and Six, but not Counts One -
22 Four, a firearm is any weapon which or is designed to or
23 may readily be converted to expel a projectile by the action
24 or an explosive, and it includes the frame or receiver
25 of such a weapon.

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2 In order for the government to establish
3 that the weapon in question was a firearm, it is not neces-
4 sary for it to prove that the gun was in fact fired.
5 Rather, you are entitled to but need not necessarily infer
6 that the weapon was a firearm from all of the surrounding
7 circumstances, including the use and appearance of the
8 weapon and the testimony of the government's firearms
9 expert.

10 The third element you must find is that the
11 defendant possessed the firearm unlawfully. In this re-
12 gard I instruct you that Sections 265 and 265.20 of
13 the New York Penal Law make it unlawful to possess a
14 loaded firearm or to possess a firearm at the same time
15 that one possesses ammunition unless a license for such
16 firearm has been issued pursuant to Section 400 of the
17 New York Penal Law.

18 Under New York law, a firearm means any pistol,
19 revolver or other firearm of a size which may be concealed
20 on a person. In order to satisfy the element of unlawfully
21 carrying, it is sufficient if you find that the defendant
22 had in his possession a loaded Baretta semi-automatic pistol
23 and that he was not licensed to carry that weapon.

24 It is also necessary for you to find that the
25 defendant acted knowingly and willfully. As I have pre-

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2 viously instructed you, an act is done knowingly if it is
3 done voluntarily and purposely and not because of mistake,
4 accident, mere negligence or other innocent reason.

5 An act is done willfully if it is done knowingly
6 and deliberately. Willfully does not mean that the
7 defendant in addition to knowing what he is doing must
8 also know he is breaking the law, since ignorance of
9 the law is no excuse.

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11 (Continued on next page.)
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1 Like the fifth count, the sixth count in
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3 this indictment charges the defendant Kalaj with carrying
4 a firearm unlawfully during the commission of a felony.

5 However, in this count the firearm in question
6 is a loaded pen gun. Before the defendant Kalaj can be
7 convicted on Count Six, the government must prove beyond
8 a reasonable doubt each of the following elements:

9 First, that the defendant was committing a
10 federal felony on or about December 21, 1976;

11 Second, that during the commission of the
12 felony, he was carrying a firearm;

13 Third, that he was carrying the firearm un-
14 lawfully; and

15 Fourth, that the defendant acted knowingly
16 and willfully.

17 The first element of Count Six which you
18 must consider is whether the defendant was committing a
19 federal felony on or about December 21, 1976. This
20 element is the same as the first element of Count Five
21 which I had previously told you about. Everything I said
22 in relation to that element applies here.

23 In summary, if you find that the defendant
24 is guilty of any of the crimes alleged in Counts One, through
25 Four, then this element is satisfied.

The second element which you must consider is whether during the commission of the felony, the defendant was carrying a firearm. The definition of a firearm for this count is the same as that given to you in connection with Count Five. However, as I have noted, the item which the government contends is a firearm with respect to this count is the allegedly loaded pen gun which Johnson allegedly handed Kalaj before Kalaj and Raffa left the real estate office.

As in Count Five, the third element you must find is that the defendant possessed the firearm unlawfully. Unlawfully simply means contrary to law. In the context of this count, it means carrying a pen gun without serial numbers required by law or without registering in the National Firearms Registration and Transfer Record.

Thus, if you find beyond a reasonable doubt that Kalaj possessed a pen gun which was handed to him by Johnson as distinguished from the hundred pen guns allegedly contained in the box, and the pen gun either had no serial number or was not registered in the National Firearms Registration and Transfer Record, you may find that Kalaj was carrying it unlawfully.

It is not necessary that you find that both things are true. It is enough to satisfy this element

1 if you find beyond a reasonable doubt that one of the
2 two is true.
3

4 And, finally, as in Count Five, you must find
5 that the defendant acted knowingly and willfully. As
6 I previously instructed you, an act is done knowingly
7 if it is done voluntarily and purposely and not because
8 of mistake, accident, mere negligence or other innocent
9 reason.

10 An act is done willfully if it is done knowingly
11 and deliberately. Willfully does not mean that the de-
12 fendant in addition to knowing what he is doing must
13 also know that he is breaking the law.

14 Again, ignorance of the law is no excuse.

15 Now, with respect to all of the charges in
16 the indictment, the defendant Galaj contends that he was
17 the victim of entrapment by an agent of the government.

18 Entrapment is a legal term which has a technical
19 meaning differing from that which it has in ordinary usage.
20 Therefore, I must explain the meaning of the word as it
21 is used in the law.

22 Entrapment occurs in essence when the idea or
23 design of committing the crimes alleged originates with
24 a law enforcement officer, rather than with a defendant.
25 The defendant has no disposition, intent or purpose to

1
2 commit the alleged offenses and the law enforcement officer
3 or government employee implants in the mind of an otherwise
4 innocent defendant the disposition to commit the alleged
5 offense and instigates and incites its commission in order
6 that the defendant might be arrested and prosecuted.

7 Thus if you find any credible evidence
8 creating the reasonable possibility that a government
9 agent or employee instigated and incited or otherwise
10 induced the defendant to commit the crimes charged, then
11 the government must prove beyond a reasonable doubt that
12 such inducement was not the cause or creator of the crime,
13 that is that the defendant had been predisposed and willing
14 to commit the crimes.

15 But if you find beyond a reasonable doubt
16 that an agent or employee of the government merely afforded
17 a favorable opportunity or facilities to the defendant for
18 the commission of the alleged crime and that the defendant
19 was ready, willing and able to commit the offenses charged,
20 then the government's conduct does not constitute entrap-
21 ment.

22 Entrapment would occur only if you find that
23 the defendant lacked the predisposition to commit the
24 alleged offenses and that the government agent actually
25 implanted the criminal design in the mind of the defendant.

1 hprp 43
2 In summary, if you find by a preponderance
3 of the evidence that Kalaj was entrapped as I defined
4 entrapment a few moments ago, then you must find him
5 not guilty.

6 If, on the other hand, you find that the govern-
7 ment has proved each element of any of the crimes charged
8 beyond a reasonable doubt and you do not find by a
9 preponderance of the evidence that Mr. Kalaj was entrapped,
10 then you may find him guilty on the count or counts
11 which you find to have been proved beyond a reasonable
12 doubt.

13 Now, I wish to make some more general comments
14 with respect to the testimony which you have heard these
15 past few days. In performing your function, one of the
16 most important things you have to do is to pass upon
17 the credibility, that is, the believability of the various
18 witnesses who have appeared before you.

19 In passing on the credibility of each of the
20 witnesses, there are certain considerations you may well
21 have in mind. One of these is the appearance which the
22 witness made when he was on the stand. You should try
23 to size him up. Did he appear to be telling the truth?
24 Did he appear to be honest? Did he appear to be intelligent?
25 Did he appear to be a person who would have observed

1 accurately what he is telling you about, who would be
2 likely to have remembered it accurately and who was
3 capable of reporting it to you accurately?
4

5 Another question for you to have in mind
6 regarding each witness is whether the story he has told
7 you is plausible. Does it ring true or are there in-
8 consistencies in it? How does it fit in with the other
9 evidence in the case, which you do believe, to other
10 facts you find to have existed. Does it jibe with other
11 evidence and those facts? In short, does the testimony
12 which was given by the particular witness whose credibility
13 you are considering seem to be plausible. Evidence
14 that a witness pleaded guilty in the past to certain
15 crimes may be considered by you in ascertaining that wit-
16 ness' credibility. By this I mean you may consider the
17 prior conviction in determining the witness' worthiness
18 or belief.

19 Another question you may well ask yourself
20 on passing the credibility of any witness is whether that
21 witness has any bias or interest in the outcome of the
22 case and if so, whether he has permitted that bias or
23 interest to color his testimony. It, of course, does not
24 follow simply from the fact that a witness does have a
25 bias or does have an interest in the outcome of the case

2 that testimony is to be disbelieved.

3 In considering the testimony of the government
4 witnesses, you should bear in mind that their testimony
5 is entitled to no greater significance simply because
6 they are employees of the government. Their testimony
7 should be subject to the same considerations you apply
8 to any witness, regardless of their employment by the
9 government.

10 Also there is no presumption against the govern-
11 ment from its failure to call a witness when it appears
12 that his testimony would be merely cumulative or repetitious
13 and of no greater value than that of the witnesses who
14 have in fact testified.

15 In this regard, you are instructed you may
16 not draw any inferences whatsoever from John Johnson's
17 failure to testify, for he was not available to counsel
18 for either side.

19 Now, in this case, both of the defendants
20 testified before you. The law permits but does not require
21 a defendant to testify in his own behalf. Obviously a
22 defendant has a deep personal interest in the result of
23 his trial. Indeed it is fair to say he has the greatest
24 interest. Interest creates a motive for false testimony
25 and a defendant's interest in the result of his trial is

of a character possessed by no other witness.

In appraising the credibility, you may take that fact into consideration. However, I want to say this with equal force to you. It by no means follows that simply because a person has a vital interest in the end result he is not capable of telling a truthful and straightforward story. It is for you to decide to what extent, if at all, the defendant's interest has affected or colored his testimony.

You also heard testimony about statements made by Lawrence Morici. If you find that he made such statements, then you may give them such weight as you believe his statements deserve after considering all of the circumstances which were brought out in the evidence.

Specifically, the government contends that after Lawrence Morici was arrested, he was questioned by Special Agent Raffa in the presence of other agents.

The government contends that at that time Morici said in substance that the \$300 seized from him was his, and that he was selling jeans, not guns, and didn't know anything about guns.

The government submits that the evidence has shown that it was Special Agent Raffa who had given Morici the \$300 and that Morici had sold the initial lot of 100

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2 pen guns to Kalaj and Johnson and that he was negotiating
3 with Raffa directly to sell another 100 pen guns.

4 The government contends that this evidence
5 shows that the statements Morici made to Raffa after
6 he was arrested were false.

7 Defendant Morici on the other hand contends
8 that he never claimed that the \$300 seized from him had
9 been received from anyone other than Agent Raffa and
10 that any statements to the effect that he only sold
11 jeans or that the \$300 received from Agent Raffa was
12 for jeans were not intended to divert suspicion or to mis-
13 lead the agents, but were intended to stop the agents'
14 persistent questioning.

15 I charge you that exculpatory statements
16 voluntarily and intentionally made, when shown to be
17 false, are evidence of guilty consciousness and have
18 independent probative force.

19 In weighing the evidence before you, you
20 should bear in mind that there are two types of evidence,
21 direct evidence and circumstantial evidence. Evidence
22 is considered direct when it is introduced by a witness
23 who testifies to what he saw, heard or observed, what he
24 knows of his own knowledge or something which comes to
25 him by virtue of his senses. Circumstantial evidence

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2 is evidence of facts and circumstances from which one may
3 infer connected facts which reasonably follow in the
4 common experience of mankind. Circumstantial evidence
5 is that evidence which tends to prove a disputed fact
6 by proof of other facts which have a logical tendency
7 to lead the mind to a conclusion that those facts
8 exist which are sought to be established.

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10 (Continued on next page.)
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1 hprf 1

2 Now, circumstantial evidence we believe is of no
3 less value than direct evidence for in either case you must
4 be convinced beyond a reasonable doubt of the guilt
5 of a defendant. Let us take one simple example, one
6 which is often used in this courthouse to illustrate
7 what is meant by circumstantial evidence.

8 We will assume that when you entered the
9 courthouse this morning the sun was shining brightly outside
10 and it was a clear day. It was not raining, the sky
11 was clear. Now assume that in this courtroom the blinds
12 are drawn and the drapes are drawn so that you cannot
13 look outside, Assume as you are sitting here in the jury
14 box and despite the fact that it was dry when you entered
15 the building somebody walks in carrying an umbrella
16 from which water is dripping followed in a short while by
17 a man wearing a wet raincoat.

18 Now, on our assumption that you cannot look out
19 of the courtroom and see whether it is raining or not,
20 if you were asked is it raining you could not say that
21 you know it directly or from your observation, but
22 certainly upon the combination of facts given, even
23 though when you entered the building it was not raining
24 outside it would be reasonable and logical for you to
25 conclude that it is now raining outside.

1 hprf 2

2 That is about all there is to circumstantial
3 evidence. You infer on the basis of reason and experience
4 from an established fact the existence of some further
5 fact. There are times when different inferences may be
6 drawn from facts, whether they are proved by direct or
7 circumstantial evidence. The government asks you to draw
8 one set of inferences while the defendants ask you to
9 draw others. It is for you to decide and for you alone
10 what inferences you will draw.

11 But remember, you are to decide the case
12 upon the evidence and the evidence alone and you must not
13 be influenced by any assumption, conjecture or sympathy
14 or any inference not warranted by the facts until proven
15 to your satisfaction.

16 In conclusion, ladies and gentlemen, the purpose
17 of your deliberations is to exchange views with your
18 fellow jurors, to discuss and consider the evidence,
19 to listen to each other's argument, to present your own
20 views and to reach a unanimous verdict based solely and
21 only on the evidence if you can do so without violence to
22 your own individual conscience and judgment.

23 Each of you must decide the case for yourself
24 but do so only after the impartial consideration of the
25 evidence in the case with your fellow jurors. If you

1 hprf 3

2 fail to find beyond a reasonable doubt that the law has
3 been violated you should not hesitate for any reason to
4 find a verdict of acquittal. On the other hand
5 if you should find that the law has been violated as
6 charged you should not hesitate because of sympathy or any
7 other reason to render a verdict of guilty as a clear
8 warning that crimes of this character may not be committed
9 with impunity. The public is entitled to be assured of
10 this. Do not hesitate to reexamine your views and change
11 your opinion when after discussion it appears to be
12 in error.

13 But if after carefully weighing all of the evidence
14 in the case and the argument of your fellow jurors you
15 hold a conscientious view which differs from the others,
16 you are not to yield your view simply because you are
17 outnumbered. Your final vote must reflect your objective
18 and deeply thought out determination of the issues.
19 If in the course of your deliberations you need to
20 examine any of the exhibits or want to hear sections of
21 the tapes or desire to have any portion of the testimony
22 read back, you may send in a note to the Court asking for
23 whatever will clear up any of the questions you may have.

24 There is a caveat, admonition I must ask of
25 you. When you do have a question you should be very specific

1 hprf 4

2 about that question. If you are specific we can meet
3 your request more quickly. In communicating with the Court
4 I should admonish you that you should indicate how your
5 vote may then be divided. The reason for that is simple.
6 Your deliberations are secret and it would be a breach
7 of ethics to communicate at any time how the jury has
8 voted except to announce that you have reached a unanimous
9 verdict. In the event you members cannot agree on
10 a unanimous verdict after deliberation do not hesitate to
11 indicate how the jury has voted or why you cannot agree
12 on a verdict. Merely indicate that you consider yourself
13 deadlocked. Mr. Foreman, if I should ask you any questions
14 in court during the course of your deliberation because
15 before you answer carefully consider my question.
16 The answer calls for a yes, no, or a maybe reply.
17 Give only that reply to my question and do not volunteer
18 any additional statements.

19 In any event, do not say more than necessary to
20 inform me of your answer. When you indicate that you
21 have reached a verdict do not indicate what your verdict
22 is. You will be asked to state that orally through your
23 foreman in open court.

24 I will conclude by simply saying your oath
25 sums up your duty and that is without fear or favor to

1 hprf 5

2 anyone you will well and truly try the issues between
3 these defendants and the Government of the United States
4 based solely upon the evidence which has been introduced
5 and the Court's instructions as to the law.

6 Remember, a separate crime or offense is charged
7 against each of the defendants in the first count of the
8 indictment and Defendant Kalaj is also charged in five
9 further counts. Each offense and the evidence pertaining
10 to it should be considered separately. The fact that you
11 may find one of the accused guilty or not guilty of one
12 of the offenses charged should not control your verdict
13 as to any other offense or defendant.

14 Your verdict with respect to each count and each
15 defendant, whether it be guilty or not guilty must be
16 unanimous. This case is important to the government and
17 it is important to the defendants. Give it your faithful
18 consideration.

19 Will you swear the marshals, please.

20 (Marshals sworn.)

21 THE COURT: We will leave you in the jury box
22 now and we will have a conference in chambers.

23 (In the robing room.)

24 THE COURT: Exceptions, additions.

25 MR. BERNSTEIN: With regard to your charge on

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2 entrapment I didn't hear it before you gave it. I object
3 to that charge. I find it, respectfully, vague and
4 confusing and I do not agree with its interpretation of
5 the law especially regarding preponderance of evidence,
6 and you didn't state it is the government's duty to
7 prove beyond a reasonable doubt, you didn't explain what
8 the term inducement meant, or if they find defendant
9 was entrapped he cannot be found guilty on any of the counts
10 of the indictment.

11 You didn't explain to the jury exactly how to
12 work.

13 THE COURT: I'm not telling the jury how to
14 work. You made your objection. It is on the record.
15 Anything else?

16 MR. BERNSTEIN: That's all.

17 MR. GORDON: Other than with respect to require-
18 ment of scienter, and also with respect to your charging
19 false exculpatory statements at all; also in the
20 beginning of your charge you said that in the existence
21 of an indictment there is no presumption of guilt and I
22 except to that. The jury may feel that there may be
23 an inference of guilt.

24 THE COURT: What else?

25 MR. GORDON: Other than what I mentioned

1 hprf 7
2 before, nothing.

3 THE COURT: That's on the record.

4 MS. NEUGARTEN: Your Honor, I'm in a strange
5 position. I am really advancing the comments the
6 defendants' might but I want to make certain this is
7 clear. You charged Johnson was not available to either
8 side. The record is I have received permission from
9 Washington to ask your Honor for immunity. The record is
10 also --

11 THE COURT: As of this moment, he is not available
12 to either side because an application has not been made.

13 MR. GORDON: I specifically except to the charge
14 dealing with Johnson.

15 MR. BERNSTEIN: I do as well, your Honor.

16 THE COURT: We will let the jury go to lunch.
17 And, you are not to leave this court.

18 MR. BERNSTEIN: The only way I will leave the
19 court is if I get your permission. Why do you direct it
20 specifically to me?

21 THE COURT: Somebody said you have to go to
22 Family Court.

23 MR. BERNSTEIN: I said I would ask you first.

24 MS. NEUGARTEN: Your Honor, I understand you
25 will be trying another case in this courtroom. The only

1 hprf 8

2 request the government has if the jurors wish to hear
3 the dates we will now disassemble the sound equipment --

4 THE COURT: Don't disassemble it. What I am
5 thinking of doing is moving to chambers to try this case.
6 It is a nonjury case.

7 MR. GORDON: Do we have the Court's permission
8 to go to lunch?

9 THE COURT: Certainly.

10 MR. GORDON: And I remain in my office at
11 2 Lafayette Street. I have left my office as late as seven
12 minutes before the hour and arrived here before the hour.

13 THE COURT: All right. Where is your office?

14 MR. BERNSTEIN: In Queens. I have one in the
15 Bronx as well but I will stay here.

16 MS. NEUGARTEN: May I return to the office which
17 is in the annex, of course?

18 THE COURT: Yes. As soon as we get a message
19 we will let you know.

20 MR. GORDON: May my client also stay in my
21 office?

22 THE COURT: Yes. As a matter of fact if you
23 want to take Mr. Bernstein with you and you got air
24 conditioning, take him with you too, just so long as
25 we don't get you lost somewhere. Let us know where

1 hprf 9

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2 you are going to be.

3 THE COURT: All right.

4 (In open court, jury present.)

5 THE COURT: One further instruction to you.

6 When you go to lunch, you are not to discuss the case
7 because you will have the two alternates with you. I
8 am instructing the marshals that if all of those of you
9 who are regular jurors return to the jury room, the
10 alternates are to be discharged with the thanks of the
11 Court upon return. The alternates are to return with
12 the jury, not in the jury room, however. When they go in
13 there, if we have all 12, you stay out here and you will
14 be discharged by the marshals. The reason for that
15 is one of experience and that is I had a person become
16 ill at lunch and I had then a nonfunctioning jury
17 and I had discharged the alternates before I sent them
18 to lunch.

19 Enjoy your lunch and I will expect you back
20 in about an hour's time or something close to that, whenever
21 you can get food. You will be in the custody of the marshals
22 throughout lunch.

23 (Jury left the courtroom.)

24 (2:15p.m.)

25

2 (Jury not present.)

3 THE COURT: We received a note from the jury
4 to the effect that "May we listen to the direct testimony
5 of agent Raffa up to the time of arrest and the direct
6 testimony of Gjerdj Kalaj, also up to the time of his
7 arrest." Obviously I am not going to direct the reading
8 of all of the testimony. We are not going to retry the
9 case and I am going to instruct the jury to be more
10 specific as to its request.

11 MR. BERNSTEIN: If your Honor please, I have an
12 application, if we are finished with this. Last night
13 your Honor mentioned to the jury not to pay attention to
14 any coverage of the media in this particular time. Unfortunately
15 in the media there was extensive coverage of the Yugoslavian
16 mission by some people identified as Croatian nationalists,
17 which happens to be the same part of the world from which
18 Mr. Kalaj comes, in the Eastern European area and many of
19 the jurors I am afraid may make the connection between Mr.
20 Kalaj, who is Albanian, not Croatian, with the Croatians.
21 I know people I have spoken to this morning and last
22 night could not differentiate between the two. I would
23 ask your Honor instruct the jury that Mr. Kalaj is not
24 Croatian, is Albanian and there is no connection between
25 Croatians and Albanians.

1
2 THE COURT: I think the application is frivolous,
3 Mr. Bernstein and I will not so instruct the jury. I
4 think we made it particularly clear at the outset of this
5 trial that Mr. Kalaj was Albanian.

6 Marshal, will you get the jury in please.

7 (Jury present.)

8 THE COURT: Good morning, ladies and gentlemen.
9 I have received your note and if you will recollect in
10 my instructions to you I asked that you be specific with
11 regard to any requests as to information or testimony
12 which was given that you wish to have read back. I
13 will not read all of the testimony given by Mr. Raffa and
14 Mr. Kalaj because obviously we would be retrying the
15 case, and we could progress from there through all the --
16 I forget how many pages but it is in excess of four
17 hundred pages, which we would read back to you. What I will
18 ask you to do is to go back in to the jury room and if you
19 have a specific area which you would like read we will do
20 that but we will not retry the case.

21 I would appreciate another note.

22 (Jury left.)

23 (Recess)
24
25

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2 AFTERNOON SESSION

3 2:05 p.m.

4 (Jury present.)

xxx

5 (Court's Exhibit 3 marked)

6 THE COURT: Court's Exhibit 3 which was received
7 at 12:07 reads: "Agent Raffa and Gjerdj's testimony
8 reference to necessity of Gjerdj going to Pennsylvania
9 to obtain the guns, Gjerdj's testimony with reference
10 to establishment of the \$30 price and later price of \$20
11 for the additional sixty guns."

12 You have agreed on what has to be read.

13 MS. NEUGARTEN: That is correct, your Honor.

14 MR. GORDON: That is correct.

15 MR. BERNSTEIN: That is correct.

16 (Testimony read by reporter.)

17 THE COURT: All right, ladies and gentlemen, you
18 may go back and deliberate.

19 (Jury left)

Pursuant to R. 804(b)(3), the so-called declaration against penal interest exception to the rule against hearsay:

1. Defendant Kalaj seeks to reopen his case to offer the testimony of Katherine Raffee, a student assistant to Mrs. Neugarten.

2. Defendant Morici seeks to put Mrs. Neugarten herself on the stand.

Generally, the statements to be elicited and which Mrs. Neugarten recalls concern the time when Special Agent Raffa was first seen in the realty office and the frequency and purpose of his attendance there. Mrs. Neugarten's offer of proof is of course narrower than the statements which the defendants allege Johnson made.

R 804(b)(3) applies where the alleged declarant is unavailable under R 804(a)(1). That is clearly the situation here however, the rule further requires:

1. That the declarant's statements so far tend to subject him to criminal liability that a reasonable man in his position would not make the statements unless he believed them to be true, and:

2. That independent corroborative circumstances clearly indicate the trustworthiness of the statements.

Under the recent 2d Circuit decision in U.S. versus Guilett, 547 F. 2d. 745 at 754, at least four

factors should enter into the Court's decision:

1. The time of the declaration and to whom it is made.

2. The existence of corroborative evidence.

3. The extent to which it is really against penal interest.

4. The availability of the declarant as a witness.

While one of these factors, unavailability of the declarant as a witness, favors permitting Mrs. Neugarten or her assistant to take the stand, all of the other factors heavily weigh against such a measure.

In this regard, I note that:

1. Mr. Johnson took the Fifth out of the jury's presence.

2. An immunity authorization has been received.

3. Mr. Johnson cannot now be called since the Government has made no request for use immunity, and,

4. I cannot grant immunity sua sponte. (If I could, I would.)

With regard to the circumstances surrounding Johnson's declaration, I note that it was made:

1. Considerably after his arrest, indeed during the course of the Government's final preparation for

trial.

2. As part of his ongoing efforts to gain deferred prosecution.

3 To the prosecuting attorney, an individual whose testimony should not be elicited unless it is plainly against the interests of justice not to do so. In this respect, defense counsel are referred to United States v. Torres, 503 F. 2d 1120 (2d 74)), and I note that both of the defendants have already taken the stand in their own behalf.

While there is no similar problem with respect to testimony by Miss Raffee, the Court believes that other circumstances surrounding Mr. Johnson's statement render it untrustworthy.

To the extent that the defendants' own testimony is offered as corroboration, the Notes of the Judiciary Committee indicate that the accuseds' own testimony, without more, although corroborative, might as here not be indicative of the statement's reliability.

Kalaj's witnesses, in my view, do not furnish corroboration and Mrs. Neugarten's offer of proof regarding Johnson's prior inconsistent statements is also suggestive of the proposed statement's untrustworthiness.

Further, it is unrealistic to call Johnson's

statement against penal interest in anything more than a formal sense, since it was:

1 Made during negotiations for a deferred prosecution. To the extent that it was contrary to his interest on the remaining open counts, the potential harm, as all counsel recognize, was theoretical at best.

2. It was also perfectly consistent with his potential entrapment defense.

I therefore find, as a matter of discretion, that the circumstances are not such that a reasonable man would not make the statements unless he believed them to be true.

I also note that calling either prospective witness would require the Government to cross examine its present or possibly its former employee, a curious situation at best. And on cross examination, under the doctrine of completeness, I would be impelled to allow the introduction of other potentially inconsistent statements by Johnson which were made to Mrs. Neugarten in the presence of Miss Raffee.

In sum, counsel will not be permitted to call either Mrs. Neugarten or her student assistant to the stand.

1 hprf 23

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2 I do not find that it is in the interest of justice
3 with respect to the Government's case in this case to permit
4 that.

5 MR. GORDON: I respectfully except.

6 MR. BERNSTEIN: I respectfully except.

CERTIFICATE OF SERVICE

December 9, 1977

I certify that a copy of this ~~brief and~~ appendix has been mailed to the United States Attorney for the Southern District of New York.

Nathan Gelberman